Kerala Gazette No. 8 dated 22nd February 1983.

PART I A

GOVERNMENT OF KERALA

Election Department

NOTIFICATION

No. 9293|EL1|82|Elec. *Dated, Trivandrum, 30th November* 1982.

Notification No. 82|KL-LA|1|82 dated 12th November, 1982 of the Election Commission of India is hereby published.

By order,

J. S. Jesudhasan,
Chief Electoral Officer &
Special Secretary to Government.

ELECTION COMMISSION OF INDIA

Nirvachan Sadan,
Ashok Road,
New Delhi-110001.
Dated, 12th November, 1982.

NOTIFICATION

No. 82|KL-LA|1|82.—In pursuance of section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the judgment of the High Court of Kerala at Ernakulam dated 12th October, 1982 in Election Petition No. 1 of 1982.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Tuesday the 12th October, 1982|20th Asvina 1904

Present:

THE HONOURABLE Dr. JUSTICE T. KOCHU THOMMEN

Election Petition No. 1 of 1982

Petitioner:

A. C. Jose, Ambattu Snehalayam, D. H. Road, Ernakulam. by Advocate Mr. S. Narayanan Poti.

Respondents:

1. Sri Sivan Pillai, Keerodath House, Kadamangalam North Parur.
2. Sri K. S. Kunju Muhammed Keethadu Veedu, Veliyathu Nadu P. O.
3. Sri K. S. Chandran, Kaithavalappil, Chendamangalam P.O.
4. Sri E. C. Joseph, Eranullil Veedu, Gothuruthy P. O.
5. Sri S. Divakaran Pillai, Preethi Nivas, Ward No. XIV|174, Parur.

R1 by Advocates M|s T. P. Kelu Nambiar, P. G. Rajagopalan, P. Devakikutty & Sri C. M. Devan for Election Commission of India.

This Election Petition having been finally heard on 17-9-1982 and having stood over to this day for consideration this court passed the following

JUDGMENT

The petitioner prays for a declaration that the election of the 1st respondent to the Kerala Legislative Assembly from No. 70 Parur Assembly Constituency was void, and that the petitioner has been duly elected from the said constituency.

2. Six candidates contested the election on 19-5-1982 from No. 70 Parur L.A. Constituency. The 1st respondent who was a candidate of the Communist Party of India and the petitioner, a candidate of the Congress (A), were the two principal contestants. The result of the election was announced on 20-5-1982. The 1st respondent secured 30450 votes while the petitioner secured only 30327 votes. The 1st respondent thus secured 123 votes more than

the total votes secured by the petitioner. Of the 30450 votes secured by the 1st respondent, only 11268 votes had been manually cast in the conventional manner—(hereinafter referred to as "conventional votes")—in accordance with the Representation of the People Act, 1951 (the 'Act') and the Conduct of Election Rules, 1961 (the 'Rules'). The remaining 19182 votes were cast by means of electronic voting machines (for short, 'voting machines') in accordance with the directions issued by the Election Commission of India (The 'Commission') in their Notification No. 3|5|82(KL) dated 11-5-1982 (the 'notification') published in the Kerala Gazette Extraordinary dated 13-5-1982. (I shall call such votes 'machine votes'). In the case of the petitioner, on the other hand or the 30327 votes secured by him, 13446 votes were conventional votes. While the remaining 16881 votes were machine votes. These figures show that while the 1st respondent secured 2301 machine votes in excess of such votes secured by the petitioner, the petitioner secured 2178 conventional votes in excess of such votes secured by the 1st respondent.

3. The Commission made certain directions in its notification purportedly in exercise of the powers vested in it under Article 324 of the Constitution. The notification says:

> "Whereas the superintendence, direction and control of all elections to Parliament and State Legislatures are vested in the Election Commission under article 324 of the Constitution;
>
> And whereas the Election Commission, having regard to the tremendous advancement in, and potentialities of, technological development in the country, has been making endeavours to make the electoral system more scientific, simplified, speadier and fool-proof;
>
> And whereas in its aforesaid endeavours the Election Commission has decided to introduce electronic voting machines (hereafter referred to as 'Voting Machines') for conduct of poll in elections from Parliamentary and Assembly constituencies;
>
> And whereas the Election Commission has approved the design of such voting machines manufactured by the Bharat Electronics Ltd., Bangalore and Electronics Corporation of India, Hyderabad;
>
> And whereas the Election Commission has further decided to try such voting machines, on an experimental basis, for the conduct of poll on the 19th May, 1982 at certain specified polling stations in 70—Parur Assembly

Constituency in the State of Kerala at the General election to the State Legislative Assembly now being in process in pursuance of the notification dated the 17th April, 1982 of the Governor of Kerala;

And whereas the Election Commission is satisfied that by the introduction of voting machines in specified polling stations the essential requirements connected with the marking system of voting as envisaged under the Conduct of Elections Rules, 1961 have been kept in view to avoid any substantial departures;

And whereas the Representation of the People Act, 1951 and the rules made thereunder do not so for provide for the conduct of poll and counting of votes by use of voting machines;

And whereas the Election Commission is empowered to exercise powers under Article 324 of the Constitution on its own right, in an area not covered by the Acts and the rules;

Now, therefore, in exercise of powers conferred by article 324 of the Constitution and all other powers enabling it in this behalf, the Election Commission hereby makes the following directions to provide for the use of the voting machines in certain polling stations in 70—Parur Assembly Constituency in the State of Kerala, namely:—

DIRECTIONS

(1) The method of voting by voting machines shall be followed in the aforesaid election from the said Parur Assembly Constituency at such polling stations as are specified in Annexure 1.

(2) Every such polling station is hereafter referred to in these directions as the 'specified polling station'.

(3) For the conduct of poll at a specified polling station, the provisions of rules 28 to 48 of the Conduct of Elections Rules, 1961 shall apply, subject to the modifications which are considered necessary or expedient for carrying out the purposes of those rules having regard to the use of voting machines, namely:—

(a) in lieu of rules 29 to 31, the following rules shall apply:—

'29G. *Design of voting machines*:—

...."

(emphasis supplied)

4. There were 84 polling stations in the Constituency. In 34 of them, poll was conducted in the conventional manner in accordance with the Act and the Rules. In the remaining 50 specified polling stations votes were cast by means of voting machines in the manner prescribed under the directions. The directions provide that, in lieu of various statutory provisions contained in the rules certain other provisions which the Commission refers to as "rules" apply to the conduct of poll and the counting of votes by means of voting machines. The Commission has thus, in so far as voting by machines is concerned, substituted its own rules in the place of statutory rules made by the Government in terms of Section 169 of the Act.

5. The petitioner challenges the election of the 1st respondent on various grounds. The principal allegations are: The notification of the Commission is ultra vires and void as it is in conflict with the statutory rules made by the Central Government in terms of Section 169 of the Act. The machine votes are invalid votes and they ought to be discarded. The declaration of the result of the election made under Rule 64 of the Rules on the basis of votes, inclusive of machine votes, is a void declaration. The agents and partisans of the 1st respondent misled voters by asking them to press the last button on the balloting unit in order to start the machine, thereby inducing them to press the button against the name and symbol of the 1st respondent. This is alleged to be corrupt practice falling under Section 123. The machines are not foolproof, and by reason of their inherent defects votes were wrongly registered. The 18 tendered vote in the 50 specified polling stations are incapable of verification as the invalid votes recorded by the impersonators cannot be traced owing to the peculiarity of the voting machines and the Commission's directions which have dispensed with the ballot papers and their counterfoils. The use of voting machines in 50 specified polling stations, leaving 34 polling stations for conventional voting, was an act of discrimination between polling stations. Serious irregularities have taken place in polling and counting. The counting staff were exhausted. The counting halls were over-crowded. The counting staff, who were members of the N.G.O. Union, were sympathetic or biased towards the 1st respondent. All postal votes were not taken into account. The efficacy of the voting machines in correctly recording the votes is in serious doubt. The petitioner's request for recount was unreasonably and illegally denied by the Returning Officer.

6. These allegations of the petitioner are specifically denied by the 1st respondent in his written statement. He says: The petitioner has not made out any valid ground to entitle him to a

declaration that the 1st respondent's election was void or that the petitioner has been duly elected. There has been no violation of the statutory rules, and the declaration made under Rule 64 was perfectly valid. The notification of the Commission containing the directions was validly made by virtue of the power under Article 324 of the Constitution. The result of the election, in so far as it concerns the 1st respondent, has not been materially affected by the use of the machines or by reason of the alleged irregularities. There was no corrupt practice within the meaning of Section 123. The machines were fool proof and there was no defect in the manner in which the machine votes were recorded. There was no discrimination between polling stations on account of the machines. The counting was properly done and the petitioner's application for recount was rightly rejected. This court has no jurisdiction to consider the validity and vires of the Commission's notification especially when neither the Commission nor the Union of India is on the party array.

7. In response to the notice issued by this Court (in C.M.P. No. 13362 of 1982) to the Commission to enable it to express its views on some of the allegations in the petition, if it so desired, the Commission has filed a written statement signed by its Secretary Shri Ganesan. The Commission states: Article 324 of the Constitution has conferred upon the Commission certain inherent and residuary powers. Wherever the existing laws are silent in regard to a particular situation, the Commission has the necessary competence to exercise independent powers. Apprehensions have been expressed by various persons and political parties that the signatures and thumb impressions of the electors on the counterfoil of the ballot papers in which their particulars are entered disclosed their identity and violated the secrecy of voting. The need for safeguarding the secrecy is of paramount importance. The present system of conventional voting is time consuming, expensive and is liable to lead to allegations of malpractices and irregularities during counting. Steps were therefore taken by the Commission as early as 1977 to devise effective voting machines. The Commission managed to obtain 60 voting machines. Accordingly 50 polling stations were chosen out of the 84 polling stations in the constituency for the introduction of the machine. Timely steps had been taken to publicise the method of voting by means of the machines. At no time had the petitioner raised any objection to the introduction of the machines in the constituency. The Commission recommended to the Union Government the amendment of the statute for the purpose of introducing the machines. The Government did not take steps to implement the Commission's recommendation. Accordingly the Commission

thought it necessary to act on its own by virtue of its constitutional and statutory powers. The statutory rules which were substituted by the Commission were only directory in character. This is what the Commission says:

> "The rules with respect to which the minor changes were effected are only directory in nature. The system of voting by ballot paper or the procedure of voting had not been departed in respect of the use of voting machines. The only change which was effected was that an elector was to register his vote by pressing a button provided against the name and symbol of the candidate in the balloting unit instead of pressing the inked rubber stamp on the ballot paper. In the matter of exercise of voting, the elector's predilections are alone relevant. As already stated, no complaint or reservation has been expressed by any of the electors in the constituency."

8. On the basis of the averments contained in the petition and the 1st respondent's written statement, the following issues were settled on 2-8-1982 in the presence of counsel on both sides and after discussing the same with them:

"1. Whether the Notification No. 3|5|82 (KL) dated 11-5-1982 by the Election Commission making rules and directions for voting by machines, is invalid and of no effect for the reasons stated in the Election Petition? Whether the court trying an Election Petition has jurisdiction to consider the validity and vires of the said Notification, especially without the Election Commission and the Union of India on the party array?

2. Whether the votes recorded in the voting machines in the 50 specified polling stations are invalid and liable to be rejected for the reasons stated in the election petition?

3. Whether the system of voting by electronic machines introduced in the 50 specified polling stations is defective on account of the alleged inherent defects and shortcomings of the voting machines or for discrimination or haste in its introduction and therefore the election of the 1st respondent is void on account of non-compliance with the Constitution, the Representation of the People Act, 1951, and the rules framed under section 169 of the said Act as alleged in paragraph 5, 6 and 8 of the Election Petition. If so, have the alleged infirmities materially affected the election of the returned candidate?

4. Whether the petitioner is entitled to be declared as elected by rejecting the votes recorded by the Electronic Voting Machine as invalid and taking into consideration only the other votes?

5. Have the agents and the workers of the 1st respondent, with his or his election agent's consent, misled the electors by widely disseminating false information as to the manner of voting in the machines as alleged in paragraph 5 of the Election Petition? Has the 1st respondent committed a corrupt practice under Section 123 of the Representation of the People Act? Whether the allegations in the Election Petition and the schedule amount to corrupt practice under Section 123 of the Representation of People Act?

6. Was the counting of votes in No. 70 Parur Assembly Constituency made in circumstances leading to considerable errors by reason of fraud and|or mistakes in counting in regard to the valid and invalid votes as mentioned in paragraphs 9 and 10 of the Election Petition? Was the Returning Officer justified in rejecting the request of the petitioner for recounting the votes?

7. Have all postal votes been counted? Are there any more postal votes entitled to be counted as contended by the petition in paragraph 10 of the Election Petition?

8. Is the petitioner entitled to a declaration that the election of the 1st respondent is void and|or a declaration that the petitioner is duly elected, for all or any of the reasons stated in the Election Petition.

9. What is the order as to costs?"

9. With the consent of counsel on both sides issue No. 3 was amended on 16-9-1982 to read as follows:

Whether the system of voting by electronic machines introduced in the 50 specified polling stations is vitiated by reason of non-compliance with the constitutional and statutory provisions and also by reason of the alleged inherent defects and shortcomings of the voting machines resulting in improper reception, refusal or rejection of votes or the reception of void votes? And if so, have these alleged information materially affected the result of the election of the returned candidate?

It is agreed by counsel on both sides that no additional evidence is required by reason of the amendment of issue No. 3.

10. Questions of considerable importance arise in this case. The validity of the Commission's notification has been impeached by the petitioner. The jurisdiction of this Court to consider that matter has been questioned by the 1st respondent. One fundamental question is whether the petitioner is justified in contending that the machine votes are invalid votes and that they ought to be discarded. The case of the petitioner in effect is that, as a result of non-compliance with Constitutional and statutory provisions, and, improper reception, refusal or rejection of votes, or, the reception of votes which are void, within the meaning of Section 100 (1) (d) (iii) and (iv), the result of the election, in so far as it concerns the 1st respondent, has been materially affected.

11. In the course of arguments on 16-9-1982, the petitioner's counsel Shri Narayanan Poti submitted that the petitioner did not any longer press Issues 5, 6 and 7 and that counsel did not propose to submit arguments on those issues. Counsel on both sides agree that I need not deal with or enter any finding on Issues 5, 6 and 7. This is recorded. I shall therefore deal only with Issues 1 to 4, 8 and 9.

12. *Issue No. 1—Competence of the Court*

The principal contention of the petitioner is that the notification of the Commission is ultra vires its powers and therefore void and of no effect in so far as the Commission has sought to replace the statutory rules by its own rules. The petitioner's counsel Shri S. Narayanan Poti submits that any vote cast otherwise than strictly in accordance with the Act and the Rules made thereunder is invalid. All votes cast by means of voting machines are votes cast otherwise than in accordance with the statutory provisions. Accordingly, counsel says, the votes secured by both the candidates in the 50 specified polling stations in accordance with the directions contained in the notification, with the Commission refers to as the 'rules', and which are in direct conflict with the statutory provisions are invalid votes and are therefore liable to be discarded in determining the result of the election. This is a question of wide import and I shall presently deal with it; but before I do so, I shall examine the validity of the challenge made by the 1st respondent against the jurisdiction of this Court to consider the vires of the Commission's notification. The 1st respondent's counsel Shri T. P. Kelu Nambiar points out that this Court is not sitting in exercise of its jurisdiction under Article 226 of the Constitution, but only as an election court, and as such it is not competent to consider the validity of a notification issued by a constitutional authority, such as the Commission, especially when the Commission and the Government of India are not parties to the present proceeding. *

*Counsel on both sides have made an endorsement to this effect. (See the Issues dated 2-8-1982)

13. It is true that the Election Commission and the Government of India are not parties to the present proceeding; and it is rightly so. The only persons who are competent parties to an election petition are the contesting candidates themselves and none other. "The ring is closed to all except the petitioner and the candidates at the election." (*Jyoti Basu* V. *Devi Ghosal* A. I. R. 1982 S. C. 983, para 9). The petitioner has rightly therefore not impleaded the Commission and the Government of India. That does not however mean that the petitioner is not entitled to seek the remedy available under section 98 on any of the grounds mentioned under Sections 100 and 101 of the Act.. The case of the petitioner is that the notification is invalid in so far as it is in violation of the statute, and that such violation has led to non-compliance with the constitutional and statutory provisions, and the reception of void votes. This is a ground which is open to him to urge only by means of an election petition, and not in any other proceeding. It is a matter of primary importance that the election should be completed as early as possible according to the time schedule and all matters of controversy arising out of the election are necessarily postponed till the elections are over. All such disputes can only be brought before the competent court by means of an election petition and not by any other proceeding while the election is in progress.

> "Article 329 (b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission..........
>
> Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.
>
> ....(T) here is remedy for every wrong done during the election in progress although it is postponed to the post election stage and procedure as predicated in Article 329(b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidate..........
>
> ....(T) he bar of Article 329 (b) is as wide as the door of section 100 read with Section 98................"
>
> [*Mohinder Singh Gill* v. *The Chief Election Commissioner, New Delhi* (A. I. R. 1978 S. C. 851, 886). See also *N. P. Ponnuswami* v. *The Returning Officer, Namakkal Constituency* (A.I.R. 1952 S. C. 64)].

In the circumstances I hold that there is no substance in the objection raised by the 1st respondent to the jurisdiction of this Court to consider the validity of the notification.

14. *Validity of the Notification*

The preamble to the notification says that the directions have been issued in exercise of the power vested in the Commission under Article 324 of the Constitution. Being conscious of the progress made in our country in the field of technology and of its potentialities in making the electoral system more scientific and efficient, the Commission decided to introduce electronic voting machines for the conduct of poll in the 50 specified polling stations on an experimental basis with a view to ascertaining the feasibility of introducing such machines on an all India basis in the future elections. For this purpose certain directions were issued by the Commission under the notification, in view of the fact that the existing provisions contained in the Act and the Rules did not provide for the conduct of poll and counting of votes by means of voting machines. These directions are intended to operate in an area not covered by the Act and the Rules. I shall refer to the "rules" introduced by the Commission as "directions" as the Commission itself has called them in the preamble.

15. It cannot be gain said that, in so far as the voting machines are concerned, the directions of the Commission displace certain statutory rules. Having designated the new provisions as directions in the preamble, the Commission has for some reason called them rules (albeit with the suffix 'C' presumably to indicate their source) and substituted them for statutory rules. Take, for example, clause 3(a) of the directions which reads:

> "in lieu of rules 29 to 31, the following rules shall apply:—
>
> '29C. Design of Voting Machines'.—"
>
> (emphasis supplied)

The same style of substitution is adopted throughout the directions. This is one reason why Shri Poti submits that on the face of it the notification is vitiated by the fact that the Commission has displaced statutory rules by its own "rules", this, counsel says, the Commission has no right or power to do.

16. The directions, when read literally, side by side with the statutory rules, appear to be inconsistent with the latter. To take only a few examples, Rule 29 refers to a ballot box, while direction 29C refers to a voting machine. Rule 30 says:

> "(1) Every ballot paper shall have a counterfoil attached thereto, and the said ballot paper and the counterfoil shall be in such form, and the particulars therein shall be

in such language or languages, *as the Election* Commission may direct.

.. .."

(emphasis supplied)

But the Commission has, as far as machine voting is concerned, dispensed with the counterfoil altogether. The Commission has a special reason for doing so. That is clear from its written statement as well as from the evidence of its Secretary (C. W. 1). The Commission is of the view that a counterfoil is an anachronism and the anti-thesis of secrecy. The counterfoil was therefore altogether dispersed with. This makes identification of voters impossible. Shri Poti submits that the object of Rule 30 is to identify impersonators wherever it has come to light from the tendered votes that such fraud has been committed. In cases where the margin between the principal rivals is narrow and a relatively large number of persons have tendered votes, it would be absolutely essential in the interest of purity of election to trace the counterfoil votes of the imposters and ascertain for whom they have cast those votes. The counterfoil, which contains the necessary details, such as Electoral Roll No. and Serial No. of the voter, Serial No. of the ballot paper and the signature or thumb impression of the voter, alone provides the clue to the persons who voted. [1]Shri Poti rightly submits that purity of election is of paramount importance and that in case where impersonation has taken place in large numbers in comparison to the actual difference between the votes secured by the contesting candidates, the need for identification overrides the principle of secrecy. (See *S. Raghbir Singh Gill* V. *S. Gurucharan Singh Tohra,* A. I. R. 1980 S. C. 1362, 1372; *Dr. Wilfred D'Souza* V. *Francis Menino Jesus Ferrao*—1977 (1) S. C. C. 396). This Criticise against the direction to dispense with counterfoil deserves proper examination in an appropriate case—and the testimony of C. W. 2 on the point regarding technical feasibility[2] will be extremely helpful as a guide—but the question in the present case is academic, for the total number of tendered votes in the specified polling stations is only 18 and the difference between the votes secured by the petitioner and the 1st respondent is 123.

17. Rule 39 refers to maintenance of secrecy of voting and voting procedure. Sub-rule (2) says:

"The elector on receiving the ballot paper shall forthwith—

(a) proceed to one of the voting compartments;

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[1]See the Handbook for Returning Officers issued by the Election Commission of India, 1979, Page 158.

[2]See below.

(b) there make a mark on the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote;

(c) fold the ballot paper so as to conceal his vote.
.. .."

The direction on the other hand says [See Rule 39 C(2)]

"......the elector shall proceed to the Presiding Officer or the Polling Officer in charge of the control unit of the voting machine who shall by pressing the appropriate button on the control unit release the balloting unit for the reception of his vote."

Sub-rule (3) of Rule 39 C says:

"The elector shall then forthwith—

(a) proceed to the voting compartment;

(b) there record his vote by pressing the button on the balloting unit against the name and symbol of the candidate for whom he intends to vote;

Like differences exist throughout the provisions.

18. The 1st respondent's counsel Shri Kelu Nambiar does not dispute that the Commission's directions, when read literally, are inconsistent with the statutory rules. But he points out that the directions and the rules point to the same and, namely, secret voting, and they both strive to achieve the object of Section 59. Both the provisions therefore equally, but differently, serve the section. He further says that marking a ballot paper and inserting it in the ballot box is but one method of voting—albeit the conventional method prescribed by the rules. The directions have no application whatever to conventional voting, and they do not make any inroad into the area covered by the statutory provisions, but they provide exclusively for voting by means of electronic machines. This, counsel says, is an area not covered by the Act and the Rules.

19. A vote is a means of signifying one's choice or approval; an indication, by some approved method of one's opinion or choice on a matter under discussion; an intimation that one approves or disapproves, accepts or rejects; a proposal, motion, candidate for office, or the like. To vote is to express a choice or preference by ballot or other approved means. (Shorter Oxford English Dictionary 3rd Edn.). The word ballot is derived from ballotta, a round bullet, used for casting a vote. It is a process or means of voting, by

written or printed tickets or slips of paper, *or voting machines*. It is a menas, or instrumentality, by which a voter secretly indicates his will or choice so that it may be recorded as being in favour of a certain candidate or for or against ascertain proposition or measure. (Black's Law Dictionary, 5th Edn.). Poll means the casting or recording of the votes of a body of persons; the voting at an election (Webaster's Third New International Dictionary, 1969).

20. A vote is thus the physical manifestation of the mental process signifying the choice made by the elector. Ballot is the process or means of recording that choice. Thus far the Act is in full control of the entire process of recording the choice of the elector, which is the very object of an election. The Commission has not made any inroad into these matters. What the directions touch upon is what the Act has left unprovided for, and that is referred to in Section 59, namely, the actual manner in which the choice of the elector is recorded.

21. The manner, modality or methodology of recording the elector's choice is now revolutionised by calling in aid science and technology. Automation through electronics increases the speed and efficiency and decreases the expense and bother of what was accomplished by hand through manual method. The mind that decides is still the same; so is the hand that indicates the mind's will. The hand touches the button that the mind has indicated; and the rest is done by the machine. It is no longer necessary for the elector to hold the ballot paper in his hand, pick the marking seal, locate in the ballot paper the column assigned to the candidates of his choice, press the seal within the confines of that column, fold the ballot paper carefully, and insert it in the ballot box. It is no longer necessary for the polling officers to forward the ballot papers in boxes to the counting hall where the counting officers go through the laborious process of sorting, counting and resolving controversies about doubtful votes. All this is now simplified by the machine. As the evidence will show, a machine, which is in good order and condition, never fails to record the votes exactly and correctly—there is no question of the mark being made in the wrong column or the votes being mixed up; the machine does not, unlike the ballot boxes containing the ballot papers, lose the votes recorded on it; the counting of the machine takes only a minute or two—a mere touch on the right button will do what it takes the whole day for the counting officers to accomplish manually. It is safer, quicker and cheaper. This is indeed a remarkable achievement, brought about by science and technology. This signifies the change from the past to the future; from the orthodoxy to modernity; it opens up a new vista of tremendous possibilities of bringing the multitudinous population of this vast country into more intimate and

direct contact with the machinery of democracy. This as I see, is the guiding philosophy that has inspired the Commission. There is no lack of goodwill or bona fides on that part of anyone. The question, however, is, 'Has the law been violated'?

22. Section 53 (1) says:

"*Procedure in contested and uncontested elections*—

(1) If the number of contesting candidates is more than the number of seats to be filled, a poll shall be taken".

Section 59, which refers to the manner of voting, says:

"*Manner of voting at elections.*—At every election where a poll is taken votes shall be given by ballot in such manner as may be prescribed, and no votes shall be received by proxy."

"Prescribed" means prescribed by rules made under the Act. [Section 2 (g)]. The rule making authority under the Act is the Central Government which is authorised to make rules after consulting the Election Commission.

Section 169 says:

"Power to make rules.—(1) The Central Government may, after consulting the Election Commission, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

.. ..

(c) the *manner* in which votes are to be given both generally and in the case of illiterate voters or voters under physical or other disability".

(emphasis supplied)

The statutory rules have laid down the manner of voting. But the rules did not anticipate the electronic machines, and did not provide for them. Despite the Commission's efforts over the years, the rules remained unamended. Because of the lacuna in the rules, there was no guidelines for voting by machine. It was in this virgin uncharted space—which the Commission's Secretary (C. W. 1) refers to as the vacuous area—with its tremendous potentialities for improvements and perfection through science and technology that the Commission stepped in with its notification containing the directions.

23. Voting by means of machine is indeed one of the recognised and well-known methods of casting votes.

> "Voting machines expedite the count and are helpful in reducing the possibility of election frauds........They have been held to be permissible where the constitution simply declares that all elections shall be by ballot on the theory that the term 'ballot' as used in such a provision, is not employed in its literal sense, but only for the purpose of designating a method of conducting election that will insure secrecy." (See American Jurisprudence, 2nd Edn., Vol. 26 para 253 at page 80).

Encyclopaedia Britanica (1971 Edn. Vol. 23, p. 129) says:

> "In sum, electronic voting systems seem destined within a relatively short time for nearly universal use, because they offer not only an efficient and inexpensive way for citizens to cast their votes but also a quick and accurate way of ascertaining the results."

Nevertheless, in so far as the statutory rules do not provide for voting by any other method than by marking the ballot paper in the conventional manner, votes recorded by voting machines are not votes cast and counted strictly in accordance with the rules, unless the rules are read down to accommodate the directions and treat the latter as supplementary provisions to fill up the lacunae in the rules. Can the directions of the Commission, which is the competent authority consulted by the Government in making the rules, be harmoniously and beneficially read into, or along with, the rules so as to regard them as regulatory of different and specific sets of facts and circumstances for a common end, namely, the implementation of Section 59? Or do they necessarily clash that they cannot coexist? If polling has taken place and the votes are counted in accordance with the directions issued by the Commission in its notification, are such votes liable to be discarded as void votes by reason of non-compliance with the provisions of the law, is the cardinal question that arises for consideration. The answer depends upon the nature and purpose of the directions and the competence of the Commission to make them.

24. Article 324 of the Constitution vests in the Election Commission the power of superintendence, direction and conduct of elections. It reads:

> "(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President

held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)."

.. ..

The Commission's power is derived directly from the Constitution and not as a delegate of the legislature. In the specific field constitutionally assigned to it, its authority is supreme. No law can erode it by "fabricating or constructing" repugnancy. (See the principles discussed by Lane in a different context, "The Australian Federal System," 2nd edn., pp. 863 at seq.). In its domain the powers of the Commission are plenary. It has the reservoir of authority to take any action that it deems necessary in order to discharge its constitutionally assigned functions in superintending, directing and controlling elections. The language of Article 324 (1) is absolute in terms. No law made by the legislature can divest the Commission of its authority. It is significant that, unlike clause (5) which relates to the conditions of service, the grant of power to the Commission under Article 324 is not couched in a language with the caveat that it is subject to the provisions of any law made by Parliament. The absence of any such limitation in Article 32 seems to indicate that the founders of the Constitution conferred upon the Commission in the limited field assigned to it, wide powers to enable it to discharge its constitutional functions. Articles 327 and 328 authorise the Parliament and the State legislatures to legislate upon matters relating to or in connection with elections. Article 327 says:

"*Power of Parliament to make provisions with respect to elections to Legislature. Subject to the provisions of this Constitution,* Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses."

(emphasis supplied)

Under this provision, read with Entry 72 in List I of the Seventh Schedule to the Constitution, the Parliament is competent to make law with regard to elections to either house of Parliament or to the Legislature of a State. It is important to note that Article 327 cautions the Parliament that the power given to it is subject to the provisions of the Constitution. Indeed power given under any provisions of the Constitution, in the absence of a *non obstante*

clause, is subject to the other provisions of the Constitution. This is so with regard to the power under Article 324 as well. But unlike Article 327 and 328, such caution appears to be absent in the language of Article 324. While the Parliament (under Article 327) and the legislature of State (under Article 328) are cautioned that the laws which they will pass with respect to matters relating to elections shall be subject to the provisions of the Constitution, including Article 324, the founders of the Constitution did not think it necessary to insert that caution under Section 324. Nevertheless the Supreme Court has stated that the power under Article 324 is subject to the existing law, for the Commission is not on *imperna in inperina* V. R. Krishna Iyer J. says:

"Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function.

.. ..

Article 324, on the face of it, vests vast functions which may be powers or duties, essentially administrative and marginalty even judicative or legislative.

.. ..

Two limitation at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made *valid law* relating to or in connection, with elections, the Commission, shall act in conformity with, not in violation of, much provisions but where such law is silent Article 324 in a reservoir of power to act for the vowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be *responsible to the rule of law,* act bona fide and be *amenable to the norms of natural justice* in so far as conformance to such can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, vir., elections........" (*Mohinder Singh Gill* v. *The Chief Election Commissioner, New Delhi*—A. I. R. 1976 U. C. 851, 869, 872, 886.

(emphasis supplied)

This shows that, subject to any valid law made by the legislature and subject to certain fundamental legal norms, the authority of the Commission under Article 324 is unlimited. Its authority is "empowered on its own right under Article 324 of the Constitution.........to make directions in general in widest terms

necessary and also in specific cases in order to facilitate a free and fair election with promptitude. It is therefore legitimate on the part of the Commission to make general provision even in anticipation or in the light of experience................"(*All party Hill leaders' conference, Shillong* v. *Captain W. A. Sangma*—A. I. R. 1977 S. C. 2155, 2164).

25. Referring to the plenary powers of the Commission, the Supreme Court says in *Sadic Ali* Vs. *The Election Commission of India, New Delhi*, (A. I. R. 1972 S. C. 187):

> "The opening works of Article 327 are 'subject to the provisions of this Constitution'. The above words indicate that any law made by the Parliament in exercise of the powers conferred by Article 327 would be subject to the other provisions of the Constitution including Article 324. Article 324 as mentioned above provides that superintendence, direction and control of elections shall be vested in Election Commission. It, therefore, cannot be said that when the Commission issues direction, it does so not on its own behalf but as the delegate of some other authority."

While the Commission if bound to obey valid laws made by the legislature under Article 327 or Article 328, in matters not covered by such laws, the Commission can operate on its own for the exercise of its power under Article 324. It is significant that in *Mohinder Singh Gill* v. *The Chief Election Commissioner, New Delhi* (A. I. R. 1978 S. C. 851), particular emphasis has been laid on valid law. The law made under Article 327 or Article 328 is valid only in so far as it is made consistently with 324. Any statute that erodes the constitutional authority of the Commission is not a valid law for it violates the mandate 8 Article 327 or Article 328 which says that any such law should be subject to the provisions of the Constitution. Article 324 being one such provision, no statute can divest the constitutional authority of the Commission. Nor can the Commission trench upon the provisions of a valid law made by a competent legislature. This is what Goswani J. refers to in his separate opinion in *Mohinder Singh Gill* v. *The Chief Election Commissioner, New Delhi* (A. I. R. 1978 S. C. 851, 891-92) where he says:

> "When appropriate laws are made under Article 327 by parliament as well as under Article 328 by the State Legislatures, the Commission has to act in confirmity with those laws and the other legal provisions made thereunder. Even so, both Articles 327 and 328 are 'subject' to the provisions' of the Constitution which includes Article 324 and Article 329. Since the conduct of all elections to the

various legislative bodies and to the offices of the President and the Vice-President is vasted under Article 324 (1) in the Election Commission, the framers of the constitution took care to leaving scope for exercise of residuary power by the Commission in its own right, as a creature of the Commission, in the infinite variety of situations that emerge from time to time in such a large democracy as ours. Every contingency *could not be foreseen, or anticipated with eviction. That is why there is no hedging* in *Article* 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules. That seems to be reason.

opening clause in Article 327 and . 328 which leaves the exercise of powers under Article 324 operative and effective when it is reasonably called for in a vacuous area........ But where these (the emplitude of powers) are absent, and yet a situation has to be tackled, the Chief Election Commissioner has not to fold his hands and pray to God for driving inspiration to enable him to exercise his functions and to perform his duties or to look to any external authority for the grant of powers to deal with the situation. He must lawfully exercise his power independently, in all matters relating to the conduct of elections, and see that the election process is completed properly, in a free and fair manner."

(emphasis supplied)

26. In sum, the Commission has, subject to such fetters as are validly imposed by the legislature and such other fundamental norms of law as are applicable to the particular facts and circumstances, wide and all pervasive powers in the exercise of its constitutional functions under Article 324. Competence of the legislature under Article 327 or Article 328 being subject to the other provisions of the Constitution, including Article 324, any law made by the legislature has to be read consistently with the constitutional authority conferred upon the Commission. In superintending, directing and controlling the conduct of election, the power exercised by the Commission is not only administrative but in some measure legislative. That is a power directly derived from the Constitution and is not therefore created and fettered by statute. The validity of a law must be tested by reading it back into its source. That source will then characterise the provisions and identify their true nature, intendent and scope. Viewed in this light, in the limited and specific field in which the Commission is competent to exercise administrative and legislative power,[1] its

[1]Vide *Mohinder Singh Gill V. Chief Election Commissioner, New Delhi* (A.I.R. 1978 S.C. 851).

power, in the absence of a direct clash with the statute, is as much efficacious as any other law. For the same reason, the statute must be so read as to be in harmony with the constitutional authority and function of the Commission. The directions must be seen in that light. So long as a direct and absolute confrontation is avoided, the directions issued by the Commission for the effective exercise of its power under Article 324 are good law and they must be read in such a way as toreconcile them with the Act and the Rules.

27. Confrontation is caused by inconsistent provisions of two competing statutes upon the same subject-matter. This is characteristic of a federal system where the law of the Centre and the law of the State may sometimes seek to regulate the same matter, in which event the former, to the extent of the inconsistency, will prevail over the latter. Inconsistency arises when it is impossible to obey the two laws at the same time or when there is a direct collision between the two laws or one law permits what the other prohibits or the superior law evinces on intention to cover the whole field upon which the inferior law trespasses.

28. Where the State Law, as applied to the facts of a particular case, conflicts with the Federal law, the State law may still be operative "distributively" as applied to a different set of facts. There the state law in some of its provisions clasher with the Federal law, the former may operate "divisibly" in its other provisions. The Federal law may in some cases expressly exclude the operation of any other law dealing with a topic which the former has endeavoured to cover. The validity of such exclusionary clauses depends upon the competence of the legislature. The exclusionary clause will be bad if it "fabricates" an inconsistency by intruding into matters outside its powers.[1] Any such instrusion will not invalidate the inferior law. Inconsistency can arise only if the two laws are concerned with the same subject-matter at the precise point of clash. If the Federal Law deals with 'A' and the State law with 'Y' there can be no disagreement or inconsistency between the two laws. Where, for example, the Federal law prescribes, (to cite of Australian case) health regulations for slaughter houses where most is processed for the overseas market and the State Law imposes health provisions for a slaughter house from which 95% of the processed meat goes into the domestic marked, no inconsistency can arise between the two laws. [*Swift Australian Company (Pvt.) Limited V. Boyd Parkinson* (1962) 108 *C.L.R.* 189].

[1]See Lane, " The Australian Federal System" 2nd edn. Pages 863 at sec.

29. Subba Rao J. (as he then was) stated in *Deep Chand V. State of U. P.* (A.I.R. 1959 S.C. 648, 665):

> "Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:
>
> (1) Whether there is direct conflict between the two provisions;
>
> (2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and
>
> (3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field."

In Ex. Part MC Lean—(1930) 43 C.L.R. 472, 483, Dixen J. observed:

> "But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal Law was intended to be *Supplementary to or cumulative upon the State Law*, then no inconsistency would be exhibited in imposing the same duties or in aflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."
>
> (emphasis supplied)

Inconsistency arises when the competent legislature unmistakably evinces its intention to occupy the whole field so exclusively and completely that there is no scope for the operation of any other law in the same field, lest there should be a clash between the two laws. "If one enactment makes or acts upon as lawful that which the other makes unlawful, or if one enactment makes unlawful that which the other makes or acts upon as lawful, the two are to that extent inconsistent." (Per *Issac J. in Clyde Engineering Company Limited V. Cowburn* (1926) 37 C.L.R. 466, 490.

30. The Federal law and the state law may sometimes overlap and yet neither will be ultra vires if the field is clear; but if the field is not clear and the two legislations meet, the Federal law must prevails *Grand Trunk Railway Company of Canada V. Attorney-General of Canada* (1907) A.C. 65 See also *State of Victoria V. The Common Wealth of Australia* (1937) 58 C.L.R. 618, 636. The rule as to the predominance of the Federal Legislation is invoked only in cases of absolutely conflicting legislation in *Pari materia*, when it would be impossible to give effect to both the Federal and State enactment. There must be a real conflict between the two laws. The two must come to a clash over a field of jurisdiction common to both, so that, while dealing with like matters they yield unlike results. (1896) A.C. 348; (1912) A.C. 333, 343, (1928) A.C. 187.

31. To sum up: Inconsistency arises between two valid laws where abedience to the one is disobedience to the other, or where the superior law has covered the whole subject matter and the existence of the inferior law disturbs or deranges this uniform coverage. See: Lane, "The Australian Federal System", 2nd Edn., 1979, p. 863 *at seq.*; Nicholas, "The Australian Constitution", 2nd Edn., 1952, p. 303; Laskin, "Canadian Constitutional Law", 2nd Edn., 1960, Ch. III. See also A.I.R. 1956 S.C. 676; A.I.R. 1979 S.C. 898; A.I.R. 1977 Madras 310.

32. Viewed in this light, can it be said that the Commission's directions are in such absolute conflict with the statutory provisions that the former must yield to the latter? Do the Act and the Rules competently exclude the operation of the directions contained in the notification, or can they all be read consistently and harmoniously?

33. The Act provides that the ballot shall be in such manner as the Government may in consultation with the Commission prescribe. The manner so prescribed is only one of the methods of voting by ballot, namely voting by means of electronic machines. The directions are exclusively applicable to machine voting. The directions and the statutory rules thus deal with two different methods of voting by ballot. It is true that many of the rules prescribed by the Government are still applicable to machine voting. Only such rules as are specifically mentioned by the Commission as not applicable to machine voting are substituted by the directions. While the rules generally deal with one subject matter, namely ballot by conventional voting, the directions specifically and exclusively deal with another subject matter which is ballot by machine voting. In so far as the 34 non-specified polling stations

are concerned, the voting took place by the conventional method and strictly in accordance with the rules. The Commission did not in any manner trench upon the prescribed rules. It is in respect of the 50 specified polling stations were machines were used did the Commission apply the directions in the place of certain provisions of the rules which can have no application to the new method adopted by the Commission. In other words, the directions are sought to be read into the Rules as "supplementary to or cumulative upon" them for the purpose of introducing voting machines. This was necessary because of the lacunae in the rules. Electronic voting machine was new to the electorate, but the Commission was satisfied that the technological developments in our country have attained sufficient level of perfection to justify the adoption of new techniques with a view to economy, speed, secrecy and purity in voting procedure. Since the system was totally new, it was not feasible to introduce it all of a sudden all over the country or all over Kerala. Even in all the polling stations in the same constituency, the limited availability of machines did not permit the introduction of the new system. It was for that reason that the machines were chosen only for the specified polling stations. This was not an act of discrimination between polling stations, as the petitioner contends, nor was it a foolhardy venture. Experiments have been conducted and the Commission in its wisdom thought it fit to introduce the machines within the limits of their availability. Wherever machines were used, the directions prevailed over the rules to the extent that the rules were inapplicable to machine voting. The directions filled up the lacunae in the rules, in so far as machine voting was concerned. The directions are only procedural in character. They are supplementary to and cumulative upon the rules for the specific purpose of dealing with a specific subject matter for which the general rules did not provide. No direction of the Commission, however, trenched upon the statutory rules in regard to conventional voting.

34. The law made by the Parliament was in exercise of its legislative power to make provision with respect to all matters relating to or in connection with elections. This is a general power which enables the Parliament to make law concerning elections. This power has to coexist with and accommodate the specific power given to the Commission under Article 324 to superintend, direct and control the conduct of all elections. The conduct of poll is a matter directly within the specific power granted by Article 324. The Commission's power, derived as it is directly from the Constitution, is plenary within its domain. That power, as the Supreme Court says, must be exercised with due regard to the law

validly made by the legislature. Such law of the legislature must be understood and construed with due regard to the caution contained in Articles 327 and 323 and to the power granted to the Commission under Article 324. To construe the statu'e unmindful of the constitutional constraint and grant will be to let the spring rise higher than its source. The statute and the rules and the directions of the Commission must receive a purposive, beneficial and harmonious construction. "Meticulous linguistic analysis of words and phrases used in different contexts in particular sections of the Act should be subordinate to this purposive approach. It should not distract (the court) from it. "*Per* Lord Diplock in *Reg. V. National Insurance Commissioner, Ex parte Hudson* (1972) S.C. 944, 1005). As Chief Justice Marshall stated:

> "If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction..........We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred." (*Gibbons V. Ogden* 9 wheat. 1. 188-89).

35. The general provisions of the Act and the Rules well as the specific directions of the Commission must, to the extent possible, receive recognition. The constitutional object demands that Article 324 from which the directions emanate receive the widest and most liberal construction with due regard to the rule of avoiding direct clash with legislation under Article 327 and 328. A narrow construction would deny the Commission those powers which the words of the grant under Article 324 import, and cripple it by rendering it unequal to the objects for which it has been established by the Constitution. To the extent possible the Commission's directions and the statute must be so read as to reconcile the conflicting provisions. If Section 59 is not exhaustive or unqualified, but permits or recognises the Commission's directions to be supplementary to or cumulative upon the statutory provisions, and if it is possible to read the notification as filling up the lacunae in the law, then there would be no clash or inconsistency as a result of the notification.

36. The notification relates to matters which are substantively within the competence of the Commission. The directions are in their pith and substance within the Commission's domain, although

they and the provisions of the Act and the Rules overlap in regard to various matters. [1] The directions are valid and intra vires the constitutional authority of the Commission unless they directly and unavoidably conflict with the law made by the legislature.

37. When the Parliament spoke on matters of election, it presumably had no intention to oust the Commission from its constitutionally assigned domain. When section 59 provided that the ballot should be given in the manner prescribed, it could not have been intended by the legislature to prevent the Commission from improving and supplementing the prescription by adopting different and more scientific methods for the conduct of poll in ways beyond what is postulated by the rules. Section 59 is fully complied with if ballot is taken by recognised means.

The means referred to in Section 59 are those which the Government have prescribed. The Government's prescription, made in consultation with the Commission, is now found to be incomplete or insufficient to meet the new demands of a changing society.

Warranting adoption of new methodology, made available by technology. The legislature could not have intended to fetter the Commission's constitutional authority to prescribe, by supplementing the rules, ways and means of making the system of voting more scientific and modern so as to subserve the constitutional and legislative intent the better. Section 59 must be so understood. Once the Act has laid down the principle of voting by ballot, the manner in which the ballot is conducted is only a matter of modality and procedural detail. When the principle of ballot is adopted by section 59, the legislature has fully expressed itself on the point, but only to that extent. How and in what manner the ballot is to be conducted is left to the competent authority to prescribe. That the legislature has referred to the Government (in consultation with the Commission) as that authority is indeed true. But the legislature has not, and could not have intended to divest the Commission of its constitutional authority. It is in exercise of such power that the notification has been issued. It is consistent with the statute.

1. Although the doctrine of pith and substance is not directly applicable in this context, the principles upon which it has been developed will be of some guidance in understanding the true nature of the directions: see Laskin, "Canadian Constitutional Law," 2nd edn. (1960) Ch. III; see also A.I.R. 1960 S.C. 424; A.I.R. 1962 S.C. 1281; A.I.R. 1963 S.C. 90; 1937 A.C. 863; 1947 I.A. 23, 43; 1947 A.C. 503, 518, 1899 A.C. 580; 1930 A.C. 111, 118; 1943 A.C. 356, 370.

38. In sum, the directions fill up the lacunae in the rules. Those rules which are inapplicable to machine voting yield to the directions wherever machines are used. In this respect, the directions have the same constitutional validity as the rules. There is no inconsistency between them. In so far as the conventional voting was conducted strictly in accordance with the statutory rules, and the machine voting was conducted strictly in accordance with the applicable rules and the Commission's directions, and, in so far as the election was thus conducted in accordance with the letter and spirit of section 59, as that provision is understood in the manner indicated above, the Commission has fully complied with the Constitution and the laws. The notification containing the directions is, for the reasons stated above, a valid exercise of constitutional power vested in the Commission under Article 324. It is intra vires the plenary powers of the Commission and is therefore impeccable.

39. Accordingly Issue No. 1, in so far as it relates to the allegation of invalidity of the notification, is found against the petitioner. The question of jurisdiction raised by the 1st respondent under Issue No. 1 is found in favour of the petitioner and against the 1st respondent.

40. *Issues* 2, 3 *and* 4.

Machines behaved properly:

The petitioner contends that the voting machines used in the 50 specified polling stations were *inherently defective*. They were incapable of properly and faithfully recording the choice of the electorate.

41. The petitioner has deposed as P.W.1. He says that he requested the Returning Officer to record his protest against the use of the machines by way of experiment in the constituency. But he did not make any protest in writing. The machine in polling Station No. 48 went wrong after registering 33 votes. That machine had to be replaced. The machine in polling station No. 20, according to his information, got stuck, but it was rectified immediately. He does not, however, say who gave him that information. He says that the voting machine is designed in such a way that the identity of the voter cannot be disclosed, even when tendered votes call for verification. I have already referred to this point, and shall presently revert to it. The petitioner further says that the machines are capable of manipulation. The voter would not know whether his vote has been registered. The wires of the machines

are liable to get mixed up or twisted as a result of which a vote cast in favour of one candidate can be recorded in favour of another candidate. This can happen either inadvertently or because of defects or vandalism. He refers to Shri Rajamani of the Central Scientific Instrument Organisation, Kaloor, who gave him this information. Rajamani has not been examined. It is not stated in the petition that any such information was received UNB|pages 41 to 50 from Rajamani or anybody also. What is important to note is that, despite his general allegations regarding the defects and other infirmities of the voting machines, the petition is totally silent as to the material particulars of the alleged defects. There is neither specific pleas with the relevant facts nor evidence to show that any one of the machines has failed to record correctly the votes cast. Even in regard to polling stations 48 and 20, the petitioner has case, as disclosed by his evidence, that any single vote was lost on account of the defects. He has of course referred to the inspection of the machines in the room of the Registrar of this Court in terms of my orders dated 16-8-1982 and 19-8-1982 in C.M.P. No. 16431 of 1982. Certain defects were then noticed in three machines. I shall deal with these defects a little later.

42. C.W. 1 is the Secretary of the Commission. He refers to the defect noticed in the machine at polling station No. 48. He says that it was a "small mechanical defect". The unit was immediately replaced, although the defect could have been easily rectified. Even with the defect, the total number of votes as well as the individual votes of the candidates were correctly recorded. At the time of counting, the votes recorded by both these machines were fully taken into account. He had not however heard of any complaint about the machine at polling station No. 20. There is no reliable evidence regarding this allegation, apart from a vague reference to it by P. W. 1 who does not say that he has any personal knowledge of it. The evidence of C. W. 1 on these matters has not been challenged. It is fully corroborated by the Returning Officer (P. W. 5).

43. Shri S. Rangarajan (C.W. 2) is a senior Manager (Research Development) of Bharat Electronics Ltd., Bangalore, (for short 'B.E.L.'), the manufacturers of voting machines used in 42 of the 50 specified polling stations. He is a graduate in Physics and a post-graduate in Electronics. He has considerable experience in his field. He speaks with candour and learning. His testimony is extremely important in appreciating the nature and condition of the voting machines. He gives a graphic description of the machines and operates them in Court by way of demonstration. He speaks at length to the foolproof manner in which the voting

machines functioned on the date of polling in the specified polling stations and at the time of counting of votes. His evidence has not been shaken even a little bit when cross-examined on behalf of the petitioner. I am much impressed by his testimony.

44. C.W. 2 demonstrates how the machines have almost completely eliminated, the possibility of invalid votes, and how simple is the method of voting and counting. The machine consists of two parts. The control unit and the balloting unit. These two units are interconnected by a cable. The three units together constitute the whole machine. The control unit EC|006|CR 01 has been marked for identification as Machine Ext. 1 (for short, "M.E. 1"). The balloting unit No. EC|027|BT|01 has been marked as M.E. 2. The connecting cable No. 3094 013 074 55 has been marked as M.E 3. The machine is designed to serve 50 candidates. In the present case, the number of contesting candidates being six, the machine was set to six. As a voter is ready to vote the Presiding Officer presses a button in the control unit. This activates the balloting unit which is kept inside the voting compartment. The voter enters that compartment. The names of the candidates and their symbols are printed on a piece of paper which is almost identical to an ordinary ballot paper and displayed on a panel on the face of the balloting unit. By the side of each name and symbol there is a red lamp and a black button. The voter presses the button against the name and symbol of the candidate of his choice. Immediately the lamp glows for a short time to indicate that the vote is recorded and at the same time a 'deep' is heard in the control unit indicating to the Presiding Officer that the voter has cast his vote. The machine would not operate after the button has been pressed once, unless and until the Presiding Officer has cleared it by pressing the control button in the control unit for the next voter to vote. This is proof against any person voting more than once. Counting is extremely simple and it takes only a few minutes. This is amply demonstrated by C.W. 2. C.W.1 who was present in the counting hall says that each machine was counted twice, and counting took only two minutes for a machine. This is confirmed by the Returning Officer (P.W. 51. For various formalities connected with counting, such as putting the seals, filling up the forms, taking the signatures of the agents and their candidates in each of the ballot paper account, and other matters, the total time taken was no more than ten minutes. This is indeed a remarkable achievement.

45, C.Ws. 1 and 2 say that the present machines are designed not to disclose the identity of the voters. C.W.2 however says that it is possible to design the machines in such a way that,

although identification would not ordinarily be possible, it could still be had by means of what he calls a 'contingent procedure' by adopting additional instruments on specific orders of a competent court. He says that in the event of it being decided that such device is required for identification of impersonators, it can be done in the future, but the present machines are incapable of such adaptation. These machines are designed in the present fashion on specific instructions of the Commission.

46. On the basis of my orders dated 16-8-1982 and 19-8-1982 in C.M.P. No. 16431 of 1982, the parties, in the presence of their counsel and experts, inspected the 51 voting machines in the office of the Registrar of this Court on the 18th and 20th August, 1982. It was then found that three machines had developed certain defects. Accordingly I ordered on 23-8-1982 that the three defective machines as well as two good machines, one made by B.E.L., and the other by the Electronic Corporation of India, Ltd., Hyderabad (for short, E.C.I.L.) should be retained in the custody of the Registrar until further orders. The rest of the machines were allowed to be released to the commission as desired by it (vide C.M.P. No. 16431 of 1982). Two of the three defective machines were made by B.E.L. and the third by E.C.I.L. These machines were inspected in Court. The two defective machines of B.E.L. are M.Es. 4 and 5. The other machine is M.E. 6. M.E. 7 is a good machine made by E.C.I.L. C.W. 2 testifies and demonstrates that the defect in M. Es. 4 and 5 did not in any manner affect the accurate reading of the result of the election. He says:

> "In other words the only defect of these two machines M.Es. 4 and 5 is that when the total results are taken the machines do not stop at No. 6 although there were only six candidates. But they got on till 64. The total capacity of the machines is supposed to be 56. But on account of certain internal status information available to the machines they recorded up to 64. But these defects do not affect the readings in respect of Nos. 1 to 6. The figures relating to the six candidates are still retained as they were at the time of polling. The above defect can easily be rectified by a contingent procedure by having access to the clear button which is now in the sealed compartment".

He demonstrates that the machines read correctly. Counsel on all sides agree that the readings of both M. Es. 4 and 5 in regard to the total votes as well as the votes of individual candidates are identical to what have been recorded in Form No. 20. This shows that the memory of the machines, notwithstanding the defect, remains absolutely intact in so far as the six candidates are concerned.

Counsel on all sides submit that their inspection on 18th and 20th August 1982 revealed identical results. C.W. 2 now rectifies the defect in M.E. 4 by pressing the 'clear button' and the 'total button'. The machine is now in perfect working condition. The same procedure is repeated in M.E. 5 and the defect of that machine is rectified. Counsel on all sides tell me that, of all the 51 machines which they inspected at the Registrar's room, M.Es. 4, 5 and 6 alone were defective. All other machines, the readings of which they had noted, were in perfect condition.

47. C.W. 3 is the expert from E.C.I.L. He has a Master's degree in Electronics Engineering. He was present at the time of inspection on 18-8-1982 in the room of the Registrar. One of their machines did not work. That is M.E. 6 which was the one at Polling Station No. 49. Counsel on all sides agree that, when that machine was first operated, it showed the reading exactly as the result is indicated in Form No. 20 in regard to Polling Station No. 49. But on a second reading during the inspection it did not show the counts correctly. C.W. 3 now tries to work the machine, but without success. The total is shown as S "8888". Even against the individual candidates it shows the same figure. The witness tries to rectify the defect. But he does not succeed. It is however not disputed that the machine (M.E. 6) read at the time of counting on 19-5-1982 exactly as stated in Forms 17D and 20. The Returning Officer (P.W. 5) admits that all the 51 machines read exactly as recorded in Forms 17D (Part 2) and the consolidated form 20. He says that all the machines, including those at polling stations 48 and 49, functioned properly at the time of counting. No defect noticed in any one of those machines, M.E. 7 is a good machine made by the E.C.I.L. Counsel on all sides agree that it is unnecessary to demonstrate that machine as it was in perfect working condition on the date of inspection in the Registrar's room.

48. P.W. 1 and C.Ws. 1 to 3 are the witnesses who have spoken to the alleged defects. The depositions of these witnesses do not disclose any inherent or other defect or shortcoming in the voting machines which could have in any manner affected the result of the election. Not a single witness has stated that any one of the 51 machines used in the 50 polling stations failed to record and display the votes correctly. There is no evidence whatever to support the petitioner's apprehension that the voting machines, on account of their inherent vice, would not have properly registered the votes. The evidence is all to the contrary. There is no evidence that any specific complaints had been made by the voters of the constituency against the use of these machines. As stated by C.W. 1, the general response of the public was indeed very favourable. There was a

greater percentage of participation in the recent election in the specified polling stations than there was in 1980 election. It increased from 76.27% to 79.13%. The machines were used in semi-urban and rural areas, and yet the response of the electors was enthusiastic and favourable. The written statement of the Commission contains the details on this aspect. The ease and speed with which the machines operated during the demonstration in Court and the enthusiastic participation of the electors in the specified polling stations indicate that the electors have for good reasons responded to the machines extremely favourably and enthusiastically.

[1] See Annexure V to the Commission's written statement.

49. The great advantage of the voting machines, as the pleadings and evidence disclose, is the efficiency, economy, speed and ease with which the polling and counting are conducted. The machines are incapable of voting more than once without the presiding officer releasing the button on the control unit. Nobody can thus register his vote twice or for more than one candidate. The question of marking the ballot paper on the blank space or in the wrong column, as in conventional voting, does not arise. There is no possibility of invalid votes. The moment the button is pressed the vote is correctly and exactly registered by the machine. If more than one button is simultaneously pressed, the machine does not register any vote at all. Tampering or any other foulplay appears to be out of the question. This has been amply demonstrated by C.M. 2. Parur has indeed made great strides in the right direction.

Solemn responsibility:

50. I have no doubt in my mind that the voting machines registered and displayed the votes correctly at the time of polling and counting. That does not however mean that the machines have been made as perfectly as they ought to have been. The very fact that three machines subsequently developed certain troubles (albeit, a minor and temporary trouble in the case of two B. E. L. machines, and not so minor or temporary in the case of one E. C. I. L. machine) raises serious doubts as regards the efficiency, competence and devotion with which the manufacturers, two public sector undertakings, made these machines for the nation. That these machines were made for the first time is not an excuse for the machines being less than perfect. The machines are dedicated to the people of this country for the expression of their collective will. To make the machines as perfect as they ought to be is the solemn responsibility of the manufacturers. Anything less than the very best will disturb the public confidence in the accuracy of elections. It is to be hoped that with further research and better designing in the

future, the quality of these machines would improve. However, in so far as the result of the present election is concerned, whatever defects the machines might have developed subsequent to the dates of polling and counting, such defects have had no bearing whatsoever.

51. P. W. 1 speaks of a discrepancy of 9 votes. He says that Exts. P3, P4 and P5 relating to polling stations 8, 16 and 65 respectively show discrepancies of 5, 1 and 3 votes. In regard to Polling Station No. 16, the discrepancy of 1 vote is seen to have been properly explained in column 3 of Ext. P4. In regard to Exts. P3 and P5 the total discrepancy of 8 votes might have been caused, as stated by C. W. 1, on account of persons who had signed or put their thumb impressions in the Register of Voters, not voting after going into the voting compartment. It might as well have been caused by the failure of the Presiding Officers at the respective polling stations (Nos. 8 and 65) to correctly fill up Forms 17-D. The petitioner has not however produced any evidence on the point. In any case, there is no evidence whatsoever to suggest that the discrepancy was caused by reason of any defect in the machines. The discrepancy of 8 votes spoken to by P. W. 1 could not in any event have materially affected the result of the election of the 1st respondent.

52. The petitioner's criticism that the machines, designed as they now are, are incapable of tracing the *identity of impersonators* is not relevent in so far as the 50 specified polling stations are concerned. Admittedly the total number of tendered votes is only 18. Even assuming that the 18 tendered voters are genuine voters and that they had indicated their preference for the petitioner, these tendered votes could not have made any difference to the result of the election of the returned candidate, the difference between the petitioner and the 1st respondent being 123 votes. Significantly the petitioner has not chosen to examine the persons who tendered the votes.

Voters were not misled:

53. The petitioner contends that the Commission took the electors by surprise by the sudden introduction of electronic machines. The notification of the Commission was made as late as 11th May, 1982 and was published in Kerala Gazette dated 13-5-1982. That was hardly a week before the date of polling. The candidates had no time to instruct the electors in the method of using the machines. The pendency in this court of O. P. No. 3356 of 1982 filed by the 1st respondent's Chief Election Agent challenging the notification was a cause of much uncertainty as to the possibility of the machines being used in the election. All this

cost the candidates much time to instruct the electors. Owing to their unfamiliarity with the machines, the illiterate and ignorant electors of the specified polling stations which fell mostly within rural areas were scared to approach the machines and they bungled in the exercise of their franchise.

54. These allegations are not supported by the material particulars. There is no reference to the data concerning literacy in the area. The data supplied by the Commission shows that the electors responded to the machines with great enthusiasm. It is nowhere stated in the petition as to who are the Voters who were secured to go to the Polling Stations on account of the machines and who bungled while voting on account of fear or nervousness. The names and numbers of the polling stations in which such timid voters exercised their franchise are not known. The evidence of the petitioner on the point is based on hear say information. Even that information is so vague that, with the sole exeption of one Kuttappan Balakrishnan (P.W. 6.), the petitioner (P.W. 1) is not in a position to mention the names of those voters. The evidence of P. W. 6 does not indicate that he was scared of the machines and that he bungled on account of his fear. His assertion is in fact to the effect that on account of the false information given to him by the 1st respondent's agents, he made a mistake in pressing the last button. That is a matter which I shall soon discuss. None has spoken that the machine took him by surprise and so caused him prejudice. In the circumstances I am of the view that the petitioner has failed to prove that the machines made the electors nervous, or, that the short notice before the introduction of the machines caused the electors any prejudice. On the other hand the evidence of C. W. 1 indicates to the contrary.

55. The petitioner has alleged that the agents and partisans of the 1st respondent went about spreading false information about the manner in which the machines were to be operated. This allegation is referred to in the schedule to the petition as corrupt practice. The evidence adduced to prove corrupt practice is the testimony of P. Ws. 6 to 10. The issue conserting corrupt practice has since been given up by the petitioner. Nevertheless Shri Narayanan Poti refers to the evidence of P. Ws. 6 to 10 to contend that by reason of their total lack of familiarity with the machines, the electors were misguided and misled as a result of which they pressed the button against the name and symbol of the 1st respondent, although they intended to vote for petitioner. The evidence of P. Ws. 6 to 10 does not, in my view, support any such contention. It is clear from the testimony of P. W. 6 that he knowingly and deliberately pressed the last button against the name and symbol of the 1st respondent. He read the name, saw the

symbol and understood them both. He was perfectly conscious of what he did. He voted for the 1st respondent because he intended to do so. His assertion to the contrary has no credibility. The evidence of P. Ws. 7 and 10 is purely hearsay and has therefore no value. Nor is the evidence P. Ws. 8 and 9 of any higher credibility. Neither of them has stated that any mistake has been made in recording the vote. The petitioner has failed to prove that the electors were misled or misguided in any manner. Not a single vote is shown to have been thus lost or denied to the petitioner by reason of their unfamiliarity with or the peculiarity of the machines. The electors of Parur were neither scared nor gullible. They are made of sterner stuff. On all these aspects I accept the 1st respondent's evidence.

56. In the light of my finding on Issue No. 1 and in view of what I have stated concerning the exemplary manner in which the machines operated at the time of polling and counting, I hold that the system of voting by electronic machines in the 50 specified polling stations is not vitiated by reason of any improper reception, refusal or rejection of votes or the reception of void votes or by reason of noncompliance with the constitutional or statutory provisions within the meaning of Section 100 (1) (d) (iii) and (iv). The votes cast by the machines are valid votes and they have been rightly counted by the Returning Officer.

57. Issue Nos. 2, 3 and 4 are accordingly found against the petitioner.

58. *Issue Nos.* 8.—In the light of what is stated above; Issue No. 8 is also found against the petitioner. The petitioner is not entitled to any relief in this Election Petition.

59. I have held that the notification is intravires. The powers of the Commission and it is valid. I have also held that there is no inconsistency between the directions contained in the notification and the statutory provisions. The directions deal with a matter for which the Act and the Rules do not provide. I am indeed astonished at the total lack of co-ordination in the rule making progress. Rules are made by the Central Government in consultation with the Election Commission. The Commission has been moving the Government since 1980 to amend the law to provide for voting by electronic machines. The Government do not seem to have had any objection in principle to the Commission's proposal. It would have been most appropriate had the rules been suitably amended on the lines suggested by the Commission. Had this been promptly done much uncertainty about the fate of the new system

of voting could have been avoided with considerable saving of time, money and anxiety for the parties concerned.

60. *Issue No.* 9.—In view of the important questions raised in the petition, there will be no order as to costs.

61. In the result, the Election Petition is dismissed. No costs.

62. The petitioner will be entitled to a refund of the deposit made by him in this court.

63. The Registrar shall immediately intimate the substance of this decision to the Election Commission and the Speaker of the Kerala Legislative Assembly and shall thereafter send as urgently as possible an authenticated copy of this judgment to the Election Commission, as required under section 103 of the Representation of the people Act, 1951.

12th October, 1982.

(Sd.)
T. KOCHU THOMMEN,
Judge.

Issue carbon copies of this judgment to counsel appearing all sides.

(Sd.)
T. KOCHU THOMMEN,
Judge.

(True Copy)

Appendix

Petitioner's Exts.

P 1 dated 12-5-1982.	Letter No. 5-32408/82 of the Returning Officer No. 70, Parur L.A.C. and Dy. Collector (L.R.) Ernakulam addressed to the petitioner.
P 2 ,, 19-5-1982	Account of votes recorded (From No. 17 D) at polling station No. 70/1 of the No. 70, Parur L.A.C.
P 3 ,, do..	do. do. at polling station No. 70/8 of the No. 70, Parur L.A.C.
P 4 ,, do..	do. do. at polling station No. 70/16 of the No. 70, Parur L.A.C.
P 5 ,, do..	do. do. at polling station No. 70/65 of the No. 70, Parur L.A.C.
P 6 ,, 20-5-1982	Copy of petition for account filed by the petitioner before the returning officer.
P 7 ,, do..	Copy of proceedings of the Returning Officer (No. L5-35402/82) No. 70, Parur L.A.C.
P 8 ,, do.	Copy of Final result sheet of No. 70, Parur L.A.C.
Ext. P 9 dated 15-5-1982	Copy of letter No. L5/32408/82 of the Returning Officer No. 70 Parur L.A.C.
Ext. P 10	List of polling station of No. 70, Parur L.A.C.
Ext. P 11 dated 13-5-1982	Notification No. 4883/ELI/82 Elect. of the Govt. of Kerala Published as Extraordinary Gazette
Ext. P 12 ,, 20-5-1982	Original of the petition for recount filed before the R.O. by the petition.
Ext. P 12(a) ,, do.	The order of the Returning Officer of petition filed by the petitioner for recounting
Ext. P13	Postal Ballot cover (Stamped) addressed
Ext. P13(a) dated 20-5-1982	Addressed to Sri R.A. Aboobeckar
Ext. P 14 ,,	Postal Ballot paper No. 080862
Ext. P 14(a) dated 20-5-1982	Postal Ballot Paper No. 08081
Respondent's Exts.	Nil.

Court Exts.

Court C1	Pamphlet printed in English published by the Election Commission of India, titled "HOW TO VOTE ON THE ELECTRONIC MACHINE"
C1(a)	Pamphlet printed in Malayalam, Published by the Election Commission of India titled "ഇലക്ട്രോണിക്ക് വോട്ടിംഗ് മെഷീൻ ഉപയോഗിക്കേണ്ട വിധം"

Machine Exhibits

ME. 1	Central Unit of Electronic Voting Machine (No. EC/006/CRol) manufactured by Bharat Electronics Ltd., Bangalore.
ME. 2	Balloting unit with No. EC/027/BT/01
ME. 3	Connecting Cable No. 309401355
ME. 4	Central Unit of Electronic Voting Machine Used at polling station No. 64 (Defective)
ME. 5	do. do. used at Polling Station No. 66
ME. 6	Central Unit bearing serial No. EC-CU-000011 used at Polling station No. 49
ME. 7	Unit used at polling station No. 51 (No. EC-CU- 000006

Petitioner's Witness

PW 1	Sri A.C. Joses, Petitioner
PW 2	Sri A.K. Ramaseshadrinathan
PW 3	Sri K.T. Thariyan
PW 4	Sri N.J. Abraham
PW 5	Sri V. Kochu Govindan
PW 6	Sri Kuttappan Balakrishnan
PW 7	Sri Varghese
PW 8	Sri George
PW 9	Sri C.M. Joseph
PW 10	Sri K.J. Joseph
PW 11	Sri K.G. Padmanabha Menon

1st Respondent's Witness

RW1	Sri Sivan Pillai, 1st Respondent

Court Witness

CW 1	Sri K. Ganesan, Secretary, Election Commission of India.
CW 2	Sri S. Rangarajan, Senior Manager, R &D, BEL, Ltd..
CW 3	Sri T.V.P. Kameswara Rao, Technical Officer, ECI LLtd Hyderabad

By order,

(Sd.)

V. K. Rao,

Under Secretary to the Election Commission of India.